

STATE OF MICHIGAN
COURT OF APPEALS

LEE FRITZINGER,

Plaintiff/Counter-Defendant-
Appellee,

v

LISA K. FRITZINGER,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

LISA LUNDAHL,

Third-Party Defendant-Appellee.

UNPUBLISHED
November 22, 2011

No. 299852
Clare Circuit Court
LC No. 02-900594-DM

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant/counter-plaintiff/third-party plaintiff Lisa K. Fritzinger (defendant) appeals by delayed leave granted the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff/counter-defendant Lee Fritzinger and third-party defendant Lisa Lundahl (collectively referred to as appellees) and denying her motion to enforce a divorce judgment. We affirm.

Lee and Lisa Fritzinger were divorced pursuant to a consent judgment entered April 21, 2004. Lisa Lundahl is Lee's sister and was involved in several businesses with him. This case involves one of those businesses, Mid Michigan Computer Systems, Inc. (MMCS).

Before the divorce, Lundahl owned 60% of MMCS and Lee owned 40%. The business was lucrative until revenues were severely reduced when MMCS lost the Marc Glassman, Inc. (Glassman) account. In December 2000, MMCS brought an action in federal court asserting that Glassman had stolen computer software programming from MMCS. The action was pending when Lee filed for divorce on October 22, 2002. During the divorce proceedings, Lee sold 30% of his stock in MMCS to Lundahl because he was unable to contribute to the attorney fees necessary to continue the federal suit.

On August 7, 2003, the jury returned a verdict in favor of MMCS in the federal action in the amount of \$7,148,353.56. The defendants in that action appealed to the Sixth Circuit Court of Appeals on January 6, 2004. After a trial in the divorce action was conducted on January 14, 2004, Lee and defendant reached an agreement that was placed on the record. Each party was awarded

any other personal property titled in [his or her] name, in [his or her] possession or under [his or her] control including but not necessarily limited to cash, bank accounts jewelry, and any other assets, whether real, personal, expectant, or otherwise to the extent they have been disclosed during the pendency of this divorce proceedings, except those personal items noted elsewhere in this judgment.

The consent judgment entered April 21, 2004, also provided that:

D. Any net payout to plaintiff, Lee Fritzinger, by Mid-Michigan Computer Systems as a result of that company's lawsuit shall be divided 50/50 between the parties.

Lee sold his remaining stock in MMCS to Lundahl for \$20,000 in December 2004 so that he could pay a \$20,466.88 cash property settlement that the judgment in the divorce action required him to pay to defendant by December 23, 2004.

On July 20, 2005, the Sixth Circuit affirmed the judgment in favor of MMCS in the federal action. On September 28, 2005, a satisfaction of judgment was filed indicating that MMCS was paid the full amount of the judgment.¹ Because Lee had sold his remaining stock in MMCS, he did not receive any net payout as a result of the lawsuit.

In June 2008, defendant moved to enforce the judgment of divorce, asserting that she was entitled to a portion of the payout. Defendant filed an amended motion in December 2008 and a second amended motion in September 2009. In the second amended motion, she alleged that Lee had sold his remaining stock in MMCS for the purpose of defrauding defendant.

Lee moved for summary disposition and asserted that there was no evidence of fraud and that he did not receive any payout from the federal lawsuit. Following a hearing on the motion, the trial court found that Lundahl owned 100% of the MMCS stock and received 100% of the proceeds from the federal lawsuit. The court noted that none of the evidence submitted during the course of discovery showed that Lee received any of the proceeds from MMCS and that the judgment of divorce clearly provided that only net proceeds paid to Lee would be distributed between the parties. The court found no evidence of fraud on the part of Lee. Additionally, the court noted that the judgment of divorce did not have a provision that would have protected defendant's interest in the MMCS stock, and did not place any restrictions on

¹ MMCS received net proceeds of \$5,365,988.

Lee's use of the assets awarded to him. Consequently, the trial court granted summary disposition in favor of appellees.

Defendant argues that the trial court erred by granting summary disposition in favor of appellees. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party. Where the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendant asserts that summary disposition was improper because the evidence raised a question of material fact as to whether appellees committed fraud when Lee transferred his remaining stock to Lundahl for \$20,000.² Defendant maintains that Lee had a fiduciary duty to defendant to protect Lee's interest in the proceeds of the federal lawsuit and that he committed fraud when he sold his remaining interest in MMCS to Lundahl to prevent defendant from obtaining her share of the proceeds.

Appellees contend that the clear and unambiguous language of the property settlement in the judgment of divorce only gave defendant an interest in any net payout to Lee.³ They note that nothing in the judgment of divorce restricted Lee from selling his MMCS stock or imposed a duty on him to preserve his interest for defendant's benefit. They contend that any claim of fraud relating to the judgment of divorce is barred under MCR 2.612(C) where more than one year has passed since the judgment was entered.⁴ They further argue that defendant failed to present any evidence of fraud.

The clear language of the judgment provides that defendant is entitled to a share of any net payout to Lee as a result of the federal lawsuit. The judgment does not provide for a payout to defendant if Lee did not receive any payout. Additional provisions in the judgment would have been required to protect a claim by defendant to the assets of MMCS.⁵

² As noted previously, according to Lee he sold his remaining stock in MMCS to Lundahl because he had no other assets that he could liquidate in order to make a payment to defendant that was required by the judgment of divorce.

³ Defendant concedes in her brief on appeal that "it appears that [Lee] never did receive any money from the lawsuit proceeds."

⁴ Defendant concedes that "she is time barred from any claims of fraud which occurred prior to or during the parties' marriage." Under MCR 2.612(C)(1)(c), a party who asserts that the other party has committed fraud during a divorce proceeding may seek redress within one year after the judgment is entered. A party may not bring an independent action for fraud when another party liquidates assets more than one year after the judgment. *Nederlander v Nederlander*, 205 Mich App 123, 127; 517 NW2d 768 (1994).

⁵ Indeed, defendant concedes in her brief on appeal that Lee "was awarded his remaining shares of stock in MMCS without any liens, right of first refusal, or other direct collateralization."

Nonetheless, defendant argues that Lee had a fiduciary duty not to sell, transfer, or divest himself of the MMCS stock awarded to him as personal property pursuant to the judgment of divorce. Defendant acknowledges, however, that the judgment of divorce awarded Lee the stock, as well as any causes of action he may have had, without restriction. “A fiduciary duty arises ‘only when there is a reposing of faith, confidence, and trust and the placing of reliance by one upon the judgment and advice of another.’” *Mannausa v Mannausa*, 370 Mich 180, 184; 121 NW2d 423 (1963), quoting *In re Jennings Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952). Defendant concedes in her brief on appeal that “At the time of the divorce proceedings, there was no reposing of faith, confidence, and trust and the placing of reliance on one party upon the judgment and advice of the other party.” *Nederlander*, 205 Mich App at 127. She asserts, however, that the language of the judgment of divorce “reposed a level of trust in [plaintiff] that he would act in good faith once the lawsuit money was recovered.” Although defendant has abandoned this issue by failing to cite any supporting authority, *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2001), the factual premise for defendant’s argument is misplaced as Lee had sold his remaining interest in MMCS *before* the “lawsuit money was recovered.”⁶

In sum, the trial court did not err in finding that the clear and unambiguous terms of the consent judgment of divorce awarded Lee his stock interest in MMCS without limitations, that Lee had not received any net pay out from the federal lawsuit, and that the record was devoid of any evidence of fraud with regard to Lee’s sale of his remaining stock in MMCS to Lundahl in December 2004.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

⁶ With regard to allegations of fraud, defendant concedes that any allegations of fraud relating to fraud during the divorce proceeding are time-barred by MCR 2.612(C)(1)(c).